Standards of Professional Conduct in Federal Court Practice

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I. INTRODUCTION

You practice in federal court. You know your ethical obligations in federal court, right? Or do you? Well, it’s federal court, so the American Bar Association Model Rules of Professional Conduct (“Model Rules”) apply. Or is it the state’s disciplinary rules? Or both? Are there other rules? And, who dispenses punishment for violation of those standards? Is it a state disciplinary authority, the federal court, both, or none of the above? If the state disciplinary rules apply, then the federal court will follow the state’s interpretation of those rules, right? Or does it follow federal law?

This paper sets out to give an overview of the standards of professional conduct that apply in federal court, the federal court’s role in regulating professional conduct, the enforcement mechanism of the applicable standards, and possible sanctions, including disqualification of counsel and other potential sanctions.

II. PROFESSIONAL CONDUCT IN FEDERAL COURT

A. The federal court’s role in regulating professional conduct.

Federal courts exercise the power to regulate lawyers appearing before them. Federal law controls the ethical standards of attorneys in federal court. Federal courts may, but are not required to, apply state professional conduct standards regarding professional misconduct. Federal courts often do apply the ethical rules and standards adopted by the state in which the court sits. Nevertheless, the standards adopted are interpreted under federal law. And though state action is entitled to respect, e.g., state action disbarring a lawyer, it is not conclusively binding on the federal courts.

Although federal courts may set and apply their own standards of professional conduct, due process considerations still apply. Sanctioning federal courts must hold attorneys accountable to recognized standards of professional conduct, which could include behavior which responsible attorneys would recognize as improper for a member of the profession. But if responsible attorneys differ in appraising the propriety of that conduct, courts should “not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical…”

B. What are the standards of professional conduct in federal court?

Federal district court local rules specify the standards for professional conduct applicable in that federal district court. For example, the Local Rules of the United States District Court for the Western District of Texas (“Local Rules”) require compliance with the standards of professional conduct set out in the Texas Disciplinary Rules of Professional Conduct (“Texas Rules”), which are adopted as the standards of professional conduct of the Court. For matters not covered by the Texas Rules, the Local Rules provide that the Model Rules should be consulted.

A number of federal courts have adopted the American Bar Association Model Federal Rules of Disciplinary Enforcement, which deal principally with the grounds and procedures for imposing
discipline on lawyers admitted to federal courts, but also provide that, except as otherwise provided by a specific court rule, the federal court adopts, as rules of professional conduct, the rules of professional conduct adopted by the highest court of the state in which the court sits.\textsuperscript{12}

Other procedural rules may also set forth standards for disciplining attorneys practicing before the federal courts. For example, Federal Rule of Appellate Procedure Rule 46 provides, in part, that an attorney may be suspended or disbarred if found guilty of “conduct unbecoming a member of the court’s bar.”\textsuperscript{13}

C. \textbf{Special rules for government attorneys.}

Attorneys employed by and practicing on behalf of the federal government may also be subject to additional rules, including through Presidential Executive Order. For example, Executive Order 12988 - Civil Justice Reform provides guidelines for federal government attorneys with the purpose of promoting "just and efficient government civil litigation." The order “sets forth the litigation practices expected of attorneys litigating on behalf of the United States, including appropriate pre-suit and post-filing settlement efforts and use of Alternative Dispute Resolution, streamlining discovery, seeking sanctions for opposing counsel misconduct, and using litigation resources efficiently.”\textsuperscript{14}

In addition, prior to the issuance of Executive Order 12988, some courts have held, and other have suggested, that federal government attorneys are subject to more stringent professional conduct standards than non-government attorneys. For example, in \textit{Freeport-McMoran Oil & Gas Co. v. FERC}, the D.C. Circuit Court of Appeals found that a lawyer representing a government agency had a more stringent obligation to end "easily resolvable" litigation.\textsuperscript{15} The Ninth Circuit Court of Appeals, in \textit{Reid v. INS}, noted that a government lawyer in an immigration court matter has an interest "only in the law being observed, not in victory or defeat."\textsuperscript{16} In \textit{EEOC v. Waterfront Commission}, the District Court for the Southern District of New York dismissed the case and imposed a monetary sanction on the government attorney who signed the pleadings. Although the court later removed the monetary sanction, the Court noted that “[a]n attorney charged with the public's interest, if anything, should be more circumspect in the initiation of the type of litigation where too often the charge is equated with 'conviction' in the mind of the public,” and admonished that the case should "serve to put government attorneys on notice…that they will be held to the highest standards of the bar."\textsuperscript{17}

While the above-referenced cases were decided either with reference to Ethical Consideration 7-14 under a prior version of the Model Rules or prior to the issuance of Executive Order 12988, or both, nevertheless, the message from these federal courts is clear - government lawyers practicing in federal courts may be judged under more exacting standards of professional conduct and may be subject to harsher sanctions if they violate those standards.\textsuperscript{18}

III. \textbf{ENFORCEMENT OF VIOLATIONS OF PROFESSIONAL CONDUCT STANDARDS}

The enforcement of and sanctions imposed for violations of professional conduct standards are within the federal court’s inherent authority.\textsuperscript{19} A federal court's imposition of sanctions under its
inherent power is reviewed for abuse of discretion, reviewing the district court’s findings of fact under a deferential standard.20

Each federal court has enacted disciplinary rules and many federal courts have created a disciplinary mechanism.21 For example, in the United States District Court for the Western District of Texas, the Local Rules of Court set forth the disciplinary rules of professional conduct and a disciplinary mechanism for their enforcement.22 While emphasizing that any judge, including a bankruptcy judge or a magistrate judge, has inherent authority to discipline an attorney who appears before him or her, the Local Rules also provide that a judge contemplating disbarring or suspending a lawyer from practicing district-wide will refer the attorney to the District Disciplinary Committee.23

A federal court’s imposition of a disciplinary sanction for ethical violations does not preclude a state disciplinary authority from imposing discipline under the applicable state professional conduct rules based on the same conduct. And in fact, an attorney disciplined by a federal court may be referred to the applicable state authority for additional discipline.24 Similarly, the Model Rules provide that lawyers are subject to the disciplinary authorities of the jurisdictions in which they are admitted to practice, as well as the jurisdictions in which they provide legal services, and thus, those lawyers may be subject to discipline in more than one jurisdiction for the same conduct.25

A. Motions to disqualify in federal court: What law applies?

The standard of review for a motion to disqualify can also vary by jurisdiction. For example, the Ninth Circuit reviews the motion to disqualify under an abuse of discretion standard,26 while the Fifth Circuit’s standard of review in the context of a disqualification motion “is for abuse of discretion, with the underlying factual findings reviewed for clear error and the interpretation of the relevant rules of attorney conduct reviewed de novo.”27

Likewise, depending on the jurisdiction, motions to disqualify may be decided under federal law or state law. For example, in the Fifth Circuit, motions to disqualify counsel are considered substantive motions affecting the rights of the parties and thus, the courts in the Fifth Circuit apply standards developed under federal law.28 In contrast, the Ninth Circuit applies state law in determining attorney disqualification and has held it “must follow the reasoned view of the state supreme court when it has spoken on the issue.”29

Some courts, including those in the Second Circuit, use the “restrained approach” (also referred to as the “taint” standard), under which disqualification is not appropriate except “upon a finding that the presence of a particular counsel will taint the trial by affecting his or her presentation of a case.”30 On the other hand, in the Fifth Circuit, a motion to disqualify counsel is the proper method for a party-litigant to bring issues regarding any breach of ethical duty, not just a conflict of interest, to the attention of the court.31 The Fifth Circuit standard is seen by some courts as imposing “a far greater burden on the district courts to police the full range of ethical violations, without any particular sensitivity to whether or not such breaches actually threaten the integrity of the judicial process.”32
B. Other possible sanctions for violations of professional conduct standards in federal court.

As previously noted, the sanctions imposed by a federal court are within the court’s inherent authority, and are generally subject to review of the court’s decision under an abuse of discretion standard. The Model Rules do not provide for sanctions, but the scope of the Model Rules suggests such sanctions should depend on the facts and circumstances of the violation. Some of the sanctions imposed for violations of professional conduct standards in federal court have included the following:

1. Exclusion of evidence;
2. Fee forfeiture;
3. Monetary sanctions, including attorney’s fees and costs;
4. Disbarment and temporary suspension from practicing in federal court; and
5. Prohibition from representing future litigants in a particular type of case against another party.

IV. CIVIL LIABILITY FOR VIOLATION OF PROFESSIONAL CONDUCT STANDARDS

State substantive law controls any question of civil liability for breach of standards of professional conduct. It follows that whether an applicable state professional conduct rule creates a cause of action is determined by state law. For example, in Texas and Tennessee, a violation of the state’s disciplinary rules does not create a private cause of action, but could be used to define the applicable standard of liability in a professional liability trial. Similarly, the Model Rules provide that a violation of the Model Rules should not itself give rise to civil liability or create a basis for disqualification of a lawyer, but may be evidence of breach of the applicable standard of conduct.

V. THE MODEL RULES

A. A brief history.

The American Bar Association adopted the Canons of Professional Ethics in 1908. The Canons were patterned after the Alabama Code of Ethics, which had been in existence since 1887. In 1969, the ABA adopted the Model Code of Professional Responsibility. The ABA then replaced the Model Code in 1983 with the American Bar Association Model Rules of Professional Conduct. Various amendments to the Model Rules have been made since then.

B. The framework.

The Model Rules are intended to serve as a national framework for implementation of standards of professional conduct. According to the ABA, to date, California is the only state which does not have professional responsibility rules which follow the Model Rules format. However, although the form of the California code is markedly different from the form of the Model Rules, California significantly “borrows” from the Model Rules in many rules of the California code.
Thus, although the Model Rules do not set forth the identical ethical standards by which lawyers are bound in all jurisdictions, the questions raised by the principles outlined in the Model Rules are fairly universal. Thus, the Model Rules and comments can be useful guidance across jurisdictions.

The Model Rules are set out in a “Restatement-type” format. The comments to the rules are intended to provide compliance guidance, and are not intended to create broader obligations. Interpretations of the Model Rules can be found in judicial decisions and opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility.

C. Outline of professional misconduct under the Model Rules

Rule 8.4 of the Model Rules defines professional misconduct as follows:

1. Violation or attempted violation of the Rules of Professional Conduct, knowingly assistance or inducement another to do so, or do so through the acts of another;\textsuperscript{46}
2. Commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;\textsuperscript{47}
3. Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;\textsuperscript{48}
4. Engaging in conduct that is prejudicial to the administration of justice;\textsuperscript{49}
5. Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;\textsuperscript{50}
6. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;\textsuperscript{51} or
7. Engaging in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.\textsuperscript{52}

VI. CONCLUSION

At a minimum, attorneys practicing in federal court should familiarize themselves with the rules of professional conduct which may be considered by the federal court in the particular jurisdiction where the court sits. Those rules could include the following:

1. The local rules of the applicable federal district court;
2. The state rules of professional conduct of the jurisdictions in which the attorney is admitted and in which the attorney practices;
3. The American Bar Association Model Rules of Professional Conduct;
4. Executive Orders (for government lawyers); and
5. All other applicable court rules.
Resources:

With the exception of the Model Rules, the resources below identified are focused on Texas. Other states may have similar resources.

Model Rules:  

Western District of Texas Local Rules:  
http://txwd.uscourts.gov/CourtInfo/SitePages/LocalRules.aspx

Northern District of Texas Local Rules:  
http://www.txnd.uscourts.gov/civil-rules

Eastern District of Texas Local Rules:  

Southern District of Texas Local Rules:  
http://www.txs.uscourts.gov/district/rulesproc

The Texas Center for Legal Ethics and Professionalism:  www.txethics.org

State Bar of Texas Ethics Helpline: 1-800-204-2222

State Bar of Texas Website:  www.texasbar.com

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1 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000).
2 In re Synder, 472 U.S. 634, 645 n. 6, 105 S. Ct. 2874, 2881 n. 6, 86 L. Ed. 2d 504 (1985).
3 See Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) citing In re Snyder, 472 U.S. at 645, n. 6, 105 S. Ct. at 2881 n.6, 86 L. Ed. 2d 504 at 645 n. 6.
4 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b.
7 Id., 390 U.S. at 549-551, 88 S.Ct. at 1226.
8 Id., 390 U.S. at 556, 88 S.Ct. at 1229 (White, J., Concurring).
9 Id.
11 Local Rules of the United States District Court for the Western District of Texas Rule AT-7(a) (W.D. Tex. 2012).
13 F.R. App. P. 46(b).
14 Executive Order 12988 (1996).
15 Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992); see also Reid v. INS, 949 F.2d 287, 288 (9th Cir. 1991).
16 Reid, 949 F.2d at 288.
18 See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. f.
See In re Synder, 472 U.S. at 645 n.6; In re Ruffalo, 390 U.S. at 547, 88 S. Ct. at 1224.


RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c.

Western District of Texas Local Rule AT-7(d).

Id.

See, e.g., Western District of Texas Local Rule AT-7(i).

American Bar Association Model Rule of Professional Conduct (“Model Rule”) 8.5(a).

See, e.g., Radcliffe v. Hernandez, 818 F.3d 537, 541 (9th Cir. 2016).

Dynamic 3D Geosolutions LLC v. Schlumberger Limited (Schlumberger N.V.), 837 F.3d 1280, 1284 (Fed. Cir. 2016) citing In re Am. Airlines, 972 F.2d at 609 (other citation omitted)

Dynamic 3D Geosolutions LLC, 837 F.3d at 1284 (applying Fifth Circuit law and citing In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992)).

Radcliffe, 818 F.3d at 543.


In re Am. Airlines, 972 F.2d at 611 (citation omitted).


See n. 28, supra.


Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 698-701 (8th Cir. 2003).

See, e.g., Rodriguez v. Disner, 688 F.3d 645, 657 (9th Cir. 2013).

Toon v. Wackenhut Corrections Corp., 250 F.3d 950, 954 (5th Cir. 2001)

See, e.g., In re Sealed Appellant, 194 F.3d 666, 671 (5th Cir. 1999) citing In re Snyder, 472 U.S. 634, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (other citations omitted).

Toon, 250 F.3d at 954.

See, e.g., Woodruff v. Tomlin, 616 F.2d 924, 928 (6th Cir. 1980) citing Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).


See, e.g., Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App.—Dallas 2001), rev’d other grounds, 145 S.W.3d 150 (Tex. 2004); Woodruff, 616 F.2d at 936.

Model Rules, Preamble § 21.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. d.

Model Rules, Preamble § 21.

Model Rule 8.4(a).

Model Rule 8.4(b).

Model Rule 8.4(c).

Model Rule 8.4(d).

Model Rule 8.4(e).

Model Rule 8.4(f).

Model Rule 8.4(g).